1982 October 29

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS N. ZAMBAKIDES,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTRY OF FINANCE,

Respondent.

(Case No. 268/80).

Administrative Law—Administrative acts or decisions—Executory act—Not challenged by recourse within the prescribed time limit —Judicial pronouncement on interpretation of a particular law upon a recourse by another person—Applicant requesting that law as interpreted in such recourse be applied in his own case —Rejection of applicant's request a confirmatory act of the previous executory decison and cannot be made the subject of a recourse.

Legitimate interest—Article 146.2 *of the Constitution—Unreserved and free acceptance of administrative act deprives acceptor of a legitimate interest to make a recourse—For a reservation to be a proper one in law it has to be made at the material time and to the appropriate organ.*

The applicant, a public officer, retired from the Public Service at the age of 50 with effect from the 1st October, 1972. As applicant prior to his retirement had exercised an option under section 5 of the Pensions (Amendment) (No. 2), Law 1967 (18/1967) upon his retirement there was applied regulation 19(A) of the Pensions Regulations in his case by virtue of which his pensionable emoluments were reduced by six and one-quarter per centum. Soon after his retirement he started being

paid his pension which was received by him without any reservation. Following the decision of the Supreme Court in *Ionides* v. *Republic* (1979) 3 C.L.R. 679, he wrote to the respondents informing them that the option he had exercised was not free and requested that the amounts which had been deducted from his pension be paid to him in accordance with the above decision. The respondents turned down his request on the ground that in the *Ionides* case the option was exercised with a reservation whereas no reservation existed in the case of the applicant. Hence this recourse.

Held, that the fact that a judicial pronouncement has been made on the construction of a particular law or the constitutionality of same by the delivery of a judgment by the Supreme Court, does not, upon the application of a person who has not exercised his rights under Article 146 of the Constitution when the executory act in question was taken, constitute a new material with regard to which there was an obligation to carry out a new inquiry or if an inquiry was carried out that the decision reached thereunder constitutes a new executory act and not a confirmatory act of a previous executory one; that the act, therefore, is confirmatory and could not be the subject of a recourse which should fail on this ground.

Held, further, that a person who unreservedly and freely accepts an act or decision of the administration is deprived because of such acceptance of a legitimate interest entitling him to file an administrative recourse for the annulment of such act or decision; that for a reservation to be a proper one in Law it has to be made at the material time and to the appropriate organ; that no such reservation was ever made by the applicant; that on the contrary he must have been receiving his pension month after month; that since he has expressly, clearly and freely acquiesced to the administrative act and or decision taken at the time of his retirement he has no legitimate interest in the matter and consequently the recourse should fail on this ground also.

Application dismissed.

Cases referred to:

Ionides v. *Republic* (1979) 3 C.L.R. 679;

Colocassides v. *Republic* (1965) 3 C.L.R. 542;

Ktena (No. 1) v. *Republic* (1966) 3 C.L.R. 64;

Varnava v. *Republic* (1968) 3 C.L.R. 566;

Economides v. *Republic* (1980) 3 C.L.R. 219 at p. 223;

Tompoli v. *CYTA* (1980) 3 C.L.R. 266 and on appeal (1982) 3 C.L.R. 149.

Recourse.

Recourse against the refusal of the respondent to reconsider applicant's pension.

A. Dikigoropoulos, for the applicant.

S. Georghiades, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. The applicant was first employed in the Public Service on the 1st May 1947. He retired therefrom at the age of 50 with effect from the 1st October 1972, holding the post of Labour Officer, second grade, which office he had held for a period of more than three years immediately preceding the date of his retirement.

The pension rights of civil servants were regulated by the Pensions Law, Cap. 311. They were, however, changed by the Pensions (Amendment) Laws 1967 (Laws No. 9 and No. 18 of 1967). An option, however was given to those officers who wished to remain under the provisions of section 5 of the Pensions (Amendment) (No. 2) 1967, (Law No. 18 of 1967). The applicant exercised his option under the said section by signing a form (Gen. 112). Upon this in computing the annual pension and gratuity payable to him there was applied regulation 19(A) of the Pensions Regulations which are to be found in the schedule to the Pensions Law, Cap. 311. The said Regulations came into force by virtue of section 7 of Law 18/67 as from April 1st, 1967, and are to be found in the schedule to the said Law. It reads as follows:

"Pensionable emoluments of certain officers.

19A.-(1) For the purpose of Regulation 19, the pensionable emoluments of an officer who has exercised a right of election under section 5 of the Pensions (Amend-

ment) (No. 2) Law of 1967 shall be reduced by six and one-quarter per centum.

(2) In this Regulation the words 'pensionable emoluments' mean the salary and the board or board lodging allowances as increased under the Public Officers (Amalgamation of part of the Cost-of-Living Allowance with the Salaries) Law 1967."

There appears to have been taken no action whatsoever by the applicant since the date of his retirement until the 15th February 1980, when following the decision of the Supreme Court in Revisional Appeal No. 211, *Ioanides v. The Republic* (1979) 3 C.L.R. p. 679, he wrote to the respondent a letter dated 15th February 1980, (Appendix B attached to the application) which reads as follows:

"Director General,
Ministry of Finance,
Nicosia.

I refer to the recent decision of the Supreme Court in the recourse of Mr. N. Ionides (Revisional Appeal 211) on the subject of computation of the pensions of officers who were in the service on the 16th August 1960, and I hereby apply that the question of my pension be reconsidered on the basis of the aforesaid judgment for the following reasons:

(1) My choice on the form (Gen. 112) under section 5 of Law No. 18 of 1967 was not free.

(2) I signed the said form because on the accompanying circular it was stated expressly, if I did not sign I would be obliged to continue in the service until the 60th year in spite of my oral protest and reference to my rights by virtue of the existing legislation including also of the Constitution.

For the aforesaid reasons I request that you give instructions that the amounts deducted from my pension be paid to me."

On the 29th February 1980, receipt of the aforesaid letter was acknowledged and the applicant was informed that his request was being examined and that they would inform him accordingly.

By letter dated the 29th May 1980, (Appendix A), the applicant was informed that "in accordance with the advice of the Attorney General of the Republic there does not arise an obligation to the Government to review the pensions of the pensioned officers who exercised unreservedly their option under section 5 of the Pensions (Amendment) (No. 2) Law, (No. 18 of 1967), but only of those who exercised their option under a reservation similar to that of Mr. Ionides for the reason that the judgment of the Supreme Court clearly makes the reservation of rights that that applicant made a decisive factor. The ratio decidendi of the judgment is that the Court came to the conclusion and annulled the challenged act because the applicant had made that reservation. Mr. Ionides had made the following reservation on the printed form with which he exercised his option in 1967.

> 'If any provision of the above Law which affects my interests is contrary to the Constitution I reserve the right to raise this matter at the appropriate time.'

> "You have not exercised your option in 1967 with a reservation like the aforesaid and consequently there cannot be a reconsideration of the pension rights by the nonapplication of regulation 19(A)."

It may be mentioned here that the said Mr. Ionides retired from the service on the 1st February 1969 on reaching the age of 55 and filed his recourse challenging the decision regarding the computation of his pension soon afterwards and obviously within the time prescribed by Article 146.3 of the Constitution.

Upon receipt of the aforesaid communication of the 28th May 1980, the applicant filed the present recourse which is based on the following grounds:

"1. The decision complained of is based upon:

(a) The wrong assumption and/or upon the misconception

that in matters of Constitutional Law and/or Constitutional rights the reservation of such rights must be made in writing and/or that unless such written reservation is made constitutional rights can be ignored,

(b) The misconception that citizens and/or public Servants can contract out of the Law and abandon vested rights without any *consideration in return.*

2. Regulation 19A set out in the Schedule to the Pensions (Amendment No. 2) Law, No. 18/1967 which introduces a new Regulation to the Regulations set out in the Schedule to the Pensions Law CAP. 311, in so far as it purports to affect Applicant's pension entitlements is unconstitutional and hence void as against him as such Regulation alters to his disadvantage his terms and conditions of service in force at the date of the coming into operation of the Constitution and hence contrary to Article 192 thereof.

3. The provision in the said Regulation 19A that the Applicant's pensionable emoluments will be reduced by 6 1/2% merely because the Applicant elected to abide by his constitutional rights and retire as he would have retired under his terms of service in force on the date of the coming into operation of the Constitution is arbitrary and unconstitutional as infringing Article 192 of the Constitution."

It has been the case for the applicant that he has made his option with a proper reservation of his rights but it is conceded that there was no reservation recorded on the said printed form. Two affidavits, however, have been filed, one sworn by him and one by Phoedias Michael, a civil servant who is one of the officials of the Civil Servants Trade Union PASYDY. In his affidavit the applicant repeats his allegation that he signed because if he did not sign he would be obliged to continue in the service up to the 60th year of age and that he had signed in spite of his oral protest and reference to his rights by virtue of the existing Laws including also of the Constitution. In paragraph 4 thereof he says that his protests were made orally to "(a) Telesforos Nakouzis, the Director of the Department of

Social Insurance, (b) Andreas Panaretou, Senior Social Insurance Officer, and (c) officers responsible in the accounts section of the Social Insurance Department and of PASYDY."

He further deposed paragraph 5, that no responsible officer advised him at any time either before or after the signing of the said form to ask legal advice on the whole subject. Phoedias Michael in his affidavit deposed that in May 1967 the applicant, whom he knew, visited the offices of PASYDY, in Nicosia and protested for the provision of Law No. 18 of 1967 by virtue of which he was compelled to fill a printed form (Gen. 112) if he wanted to retire at his 55 year of age, alleging that he had the said right by virtue of the existing legislation and that the aforesaid provision was a blackmailing one. He further added that as far as he remembered the reply given to him that that was how it had been agreed and he had no other option. He was not told to fill in the said form with a reservation.

Assuming that the applicant made at the material time and to the appropriate organ a proper reservation when making his option under section 5 of the Law, which I do not accept but with this issue I shall be dealing later in my judgment, I would still hold that this recourse is out of time as 15 years elapsed since he made such reservation and more than 10 years since he retired from the service. The very fact that he made, as he alleged, a reservation at the time implied a knowledge of the law and of his constitutional rights and therefore a duty to exercise his rights under Article 146 of the Constitution within the prescribed time of 75 days from the date the executory decision complained of was communicated to him, as applicant Ionides did after the date of his retirement, as already pointed out.

The question of prescription could only be overcome if it was found that the decision of the respondents communicated to him by the letter of the 28th May, 1980 (Appendix 'A') was a new executory decision reached after a new inquiry into the matter and not a confirmatory one of the original decision. Extensive argument has been heard regarding the nature of the decision challenged by this recourse and in that respect I have been referred to a number of authorities which include a statement of the legal principles governing such issue to be found in *Stassi-*

nopoulos, Law of Administrative Acts, 1951, at p. 1235, and to the cases of *Nicos Colocassides v. The Republic* (1965) 3 C.L.R., p.542; *K. Ktena v. The Republic* (1966) 3 C.L.R. p.64: *Chr. Varnava v. The Republic* (1968) 3 C.L.R. 566.

As it has been said time and again, the question as to when there is a new inquiry is a factual matter and depends on the circumstances of the case. In the present case the factual background - if that reservation was ever made - was the same as it existed at the time the original executory decision was taken. A re-examination was asked by the applicant in view of the decision in *Ionides v. The Republic* (supra) but that cannot turn the new act into an executory one, as rightly, if I may say with respect, was stated in *Economides v. The Republic* (1980) 3 C.L.R. 219, at p.223, by Triantafyllides P.:

> "....., it cannot be said that an act is not confirmatory because it is the outcome of a re-examination of a certain matter from its legal aspect only, in the light of the legal situation which existed when a previous executory decision in relation to it, which is being confirmed, was taken (see, in this respect inter alia, *Lordos Apartotels Limited v. The Republic* (1974) 3 C.L.R. 471, the Conclusions from the Case-Law of the Council of State in Greece, supra, p.241, and the Decisions of the said Council in cases Nos. 5/1937, 229/1938, 439/1938, 1013/1966, 2250/1966, 2777/1968, 1916/1970, and 3137/1970)."

In my view, the fact that a judicial pronouncement has been made on the construction of a particular law or the constitutionality of same by the delivery of a judgment by the Supreme Court, does not, upon the application of a person who has not exercised his rights under Article 146 of the Constitution when the executory act in question was taken, constitute a new material with regard to which there was an obligation to carry out a new inquiry or if an inquiry was carried out that the decision reached thereunder constitutes a new executory act and not a confirmatory act of a previous executory one. The act, therefore, is confirmatory and could not be the subject of a recourse which should fail on this ground also.

There is, however, a further ground to be examined, and that is the very issue of the alleged reservation which, if it is found

not to amount in Law to a proper one, the applicant has no legitimate interest as he is taken to have accepted and or acquiesced to the executory administrative decision reached at the time of his retirement and communication to him then. The legal position is to be found in a number of decisions which have been referred to by Savvides J., in delivering his judgment in the first instance in the case of *Tomboli v. CYTA* (1980) 3 C.L.R. p. 266 and which was upheld on appeal by the Full Bench of this Court and is reported as *Tomboli v. CYTA* (1982) 3 C.L.R. p. 149 where the position is summed up to the effect that a person who unreservedly and freely accepts an act or decision of the administration is deprived because of such acceptance of a legitimate interest entitling him to file an administrative recourse for the annulment of such act or decision.

In the present case the applicant protested and or expressed his reservations, as he claims, to two officials of the Social Insurance Department, which comes under the Ministry of Labour and Social Insurance, namely Messrs. Nakouzis and Panaretos and to the Civil Servants Trade Union, PASYDY, as stated by the other affiant Phoedias Michael, one of the leading members of PASYDY.

In my view, for a reservation to be a proper one in Law it has to be made at the material time and no doubt to the appropriate organ. Mere protest and reservations or complaints about the injustice of a provision of a law made to government officials at random and to trade union leaders are not legally valid reservations made at the material time. In the circumstances of this case they ought to have been made to the Ministry of Finance which has been handling matters relating to the application and implementation of the Pensions' Law, Cap. 311 and such reservations ought to have been made also either on the form of the option as Ionides did or it should have accompanied same, or by such other conduct that it would be brought to the knowledge of the officers concerned.

In the present case the so described protests or reservations were not made in any of these ways. On the contrary the appellant after retiring month after month must have been receiving his pension and he only thought of them until after

the judgment on appeal in the *Ionides case* was delivered by the Full Bench of this Court when he came to think of their existence. To my mind the appellant has expressly, clearly and freely acquiesced to the administrative act and or decision taken at the time of his retirement and therefore he has no legitimate interest in the matter and consequently the recourse should fail on this ground also.

For all the aforesaid reasons this recourse is dismissed but in the circumstances I make no order as to costs.

Recourse dismissed. No order as to costs.